2005

Hal McKee v. Renn Smith : Reply Brief

Utah Court of Appeals

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

HAL MCKEE,	:	
Plaintiff/Appellant,	:	
v.	:	
	:	**Case No. 20050598**
RENN SMITH,	:	**Priority: Civil**
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT ENTERED IN
THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH,
THE HONORABLE A. LYNN PAYNE, JUDGE, PRESIDING.

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PUBLISHED OPINION REQUESTED

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ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO CONTINUE TO AMEND HIS COMPLAINT.

A. APPELLANT'S PLEADINGS SUFFICIENTLY PLEAD THE CLAIM OF BOUNDARY BY ACQUIESCENCE.

In *Brief of Appellee*, the Appellee argues that the court did not err in denying the Appellant's motion to amend his *Complaint* to include a claim under a boundary by acquiescence doctrine since the plain language of the *Complaint* did not set forth such a claim and the trial court correctly determined that the land belonged to Appellee. *Brief of Appellee* at p. 8. Appellee fails to sufficiently support their arguments under the particulars of the "boundary by acquiescence" doctrine and mistakenly believes the trial court's ultimate determination supports its prior decision not to allow Appellant to amend

his *Complaint*. The trial court's ultimate determination, however, was made without the claim of "boundary by acquiescence" being considered and, thus, cannot be determinative of it.

"For purposes of the doctrine of boundary by acquiescence, to "acquiesce" means to recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property." RHN Corp. v. Veibell, 2004 UT 60, ¶24, 96 P.3d 935. "Under the doctrine of boundary by acquiescence, the party attempting to establish a particular line as the boundary between properties must establish that the parties mutually acquiesced in the line as separating the properties." *Id., citing* Ault v. Holden, 2002 UT 33, ¶18, 44 P.3d 781. "Acquiescence is a 'highly fact-dependent question' [citation omitted], and 'acquiescence, or recognition, may be tacit and inferred from evidence, i.e., the landowner's actions with respect to a particular line may evidence the landowner impliedly consents, or acquiesces, in that line as the demarcation between the properties." *Id.*

The Utah Supreme Court has determined as follows:

> A plaintiff is required, under our liberal standard of notice pleading, to "submit a short and plain statement ... showing that the pleader is entitled to relief" and a "demand for judgment for the relief." UTAH R. CIV. P. 8(a)(1)-(2). The plaintiff must only give the defendant "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."

Canfield v. Layton City, 2005 UT 60, ¶14, 122 P.3d 622, *citing* Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982). Further, "[t]he rule is designed to provide notice of the nature of the claims asserted against a defendant and an opportunity to meet those claims." *See* Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982), Cowley v. Porter, 2005 UT 518, ¶36, 127 P.3d 1224.

The Utah Court of Appeals discussed the purpose of the liberalized pleading rules when it stated, "the fundamental purpose of our liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute,' subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" Zoumadakis v. Uintah Basin Medical Center, Inc, 2005 UT App 325, ¶2, 122 P.3d 891, *citing* Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982), (citations omitted). As a result, "these principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action or an affirmative defense." *Id.*

In the matter of Blackham v. Snelgrove, 280 P.2d 453, 455 (Utah 1955), the Utah Supreme Court discussed the function of pleadings, stating as follows:

> Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving

> and invest the deposition-discovery process with a vital role in the preparation for trial.
>
> . . .Thus, it can very often be found stated in these cases that a complaint is required only to '* * *give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.' It may also frequently be found stated in these cases that a complaint does not fail to state a claim unless '* * *it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.'

At trial and in Appellant's opening brief, Appellant argued that paragraphs five (5) and six (6) of his *Complaint* gave adequate fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved to Appellee that the fence that had been in existence for a substantially long period of time was the agreed upon boundary between the properties, and that Appellee was encroaching on the Appellant's property. Counsel for the Appellee stated at the hearing that he had no notice of the theory. However, in the discovery served upon the Appellee on January 14, 2004, and *Appellant's Initial Disclosures*, which were served upon the Appellee on May 4, 2004, responses and witnesses were listed indicating Appellant's position with respect to this issue, and showing supporting evidence of the nature of the claim. Appellant concedes that he did not use the language "boundary of acquiescence" in his pleading, but the language used in the pleadings and discovery process clearly provided the fair notice of the nature and basis or grounds of the claim and a general indication of the type of

litigation. *See*, Zoumadakis at ¶2. Notification and evidence respecting all particularities of a claim under boundary by acquiescence were provided. See, RHN Corp, *supra.*

As stated above, the rules that govern the filing of pleadings are liberally construed to afford parties "the privilege of presenting whatever legitimate contentions they have pertaining to their dispute." *See,*Williams v. State Farm Ins. Co., *supra.* Appellant was denied the privilege of presenting his legitimate contentions to the trial court pertaining to his dispute with the defendant in this matter. The trial court effectively revoked this privilege by denying Appellant his request to amend his *Complaint* to include the words "boundary by acquiescence" as a defined term for his already-stated claim. By so denying Appellant's request, it was clear that the trial court did not intend to render a determination based upon this doctrine, somehow believing that the already-stated claim was plead under a different claim.

The trial court erred in concluding that Appellant's claims were not plead under the "boundary by acquiescence" doctrine. Further, having done so, the trial court denied Appellant the right to amend the pleading with a defined term that was typically utilized in conjunction with the claims already set forth. Appellant's pleadings gave the Appellee fair notice of the grounds against him and notified him of the type of litigation that was involved. Even though his pleadings did not use the exact language "boundary of acquiescence," he met the requirements needed to inform the Appellee of his claims, grounds and the litigation against him. Appellee would not have suffered any prejudice

by the amendment since defendant's attorney was well notified and had prepared a defense accordingly to the witnesses and evidence presented by Appellant.

B. Appellant was Prejudiced by not being Allowed to Amend his Pleadings

"Utah Rule of Civil Procedure 15(a) states that leave to amend pleadings 'shall be freely given' by the court 'when justice so requires.'" Savage v. Utah Youth Village, 2004 UT 102 ¶9, 104 P.3d 1242, *citing* Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132, 1136 (1936). "The court's ultimate goal is to have the 'real controversy between the parties presented, their rights determined, and the cause decided.'" *Id.*

The Utah Supreme Court has discussed what provides ample support to deny a motion to amend, and has determined that simple prejudice is not enough. In Kasco Services Corp. v. Benson, the Utah Supreme Court indicated that a motion to amend should be denied only where "the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not time to prepare." 831 P.2d 86, 92 (Utah 1992) (emphasis added) (internal quotations and citation omitted). The court's insistence that the nonmoving party suffer "unavoidable prejudice" to justify a denial of a motion to amend is well-established in Utah law. *See,* e.g., Fishbaugh v. Utah Power and Light, a Div. of Pacificorp, 969 P.2d 403 (Utah 1998), Timm v. Dewsnup, 921 P.2d 1381, 1389 (Utah 1996). This is based on the principle that the parties should not be forced to litigate issues for which they had little time to respond. *See*, Timm v. Dewsnup, 851 P.2d 1178, 1183 (Utah 1993)(noting that "[a] prime consideration in determining whether an

amendment should be permitted is the adequacy of an opportunity for the opposing party to meet the newly raised matter" (*quoting* Lewis v. Moultree,627 P.2d 94, 98 (Utah 1981))); Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 91 (Utah 1963) (noting that "[w]hat [parties] are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required."). Thus, in order to justify the denial of a motion to amend on grounds of prejudice, the prejudice "must be undue or substantial prejudice, since almost every amendment of a pleading will result in some 'practical prejudice' to the opposing party. Mere inconvenience to the opposing party is not grounds to deny a motion to amend." 61A Am.Jur.2d Pleading § 776 (2003) (emphasis added). "[T]he fact that an amended pleading may require the defendant to conduct additional discovery does not, alone, constitute sufficient grounds to justify the denial of a motion to amend. In determining whether the amendment will cause prejudice, the court's inquiry should center on whether the nonmoving party has a fair opportunity to litigate the new issue." *Id.* at § 777.

As stated *supra*, Appellee would not have suffered any unavoidable prejudice by the amendment since defendant's attorney was well notified and had prepared a defense accordingly to the witnesses and evidence presented by Appellant. Appellee in this matter had sufficient notice that Appellant was making a "boundary of acquiescence" claim since he had plead the elements and provided evidential support for it throughout the discovery and disclosures. All necessary documents had been provided to the

Appellee long before trial. Appellee had plenty of time to prepare to meet the boundary by acquiescence claim at trial. Allowing Appellant to amend his pleadings to include the specific wording "boundary of acquiescence" would not have resulted in any prejudice to Appellee, since Appellee already had plenty notice of this claim.

The trial court prejudiced Appellant by not allowing him to amend his pleadings to include the boundary by acquiescence claim. The claim was plead in the original pleadings in theory, it was just not specifically defined under this terminology. Pleadings are governed by liberalized rules and Appellant should have been allowed to amend his pleadings to include the correct terminology. By denying the Appellant the opportunity to amend his pleadings, Appellant was prejudiced in that the trial court may have misconstrued his claim as something other than "boundary by acquiescence." Had Appellant been able to amend his pleadings, it is likely the trial court would have granted him relief under the doctrine and he would have been granted access to use land that is rightfully his and has been for many years.

II. APPELLANT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A BOUNDARY OF ACQUIESCENCE.

"The elements of boundary by acquiescence are 1) occupation up to a visible line marked by monuments, fences, or buildings, 2) mutual acquiescence in the line as a boundary, 3) for a period of time, 4) by adjoining landowners." Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1996). In Englert v. Zane, 848 P.2d 165, 169, (Utah App. 1993),

The Utah Supreme Court defined a boundary line by acquiescence as "...open to observation." Fuoco v. Williams, 421 P.2d 944, 946 (Utah 1966). A boundary line "must be definite, certain and not speculative." *Id.*

In Hobson v. Panguitch Lake Corp., 530 P.2d 792, 794, (Utah 1975), the Utah Supreme Court discussed the reason for the doctrine of boundary by acquiescence when it stated as follows:

> "[t]he very reason for being of the doctrine of boundary by acquiescence or agreement is that in the interest of preserving the peace and good order of society the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose. Arising out of this reason for being, an indispensable requirement for application of the doctrine is the existence of the boundary for a long period of time, which the actual decisions in all of our cases on the subject affirm."

In the instant matter the Appellant has provided sufficient evidence to prove that the boundary line of the property was established by acquiescence. Many people testified as to the existence of the fence and the length of time it had been in existence. Ms. Sarah Simmons testified that she was 82 years old and that the fence line was had been the boundary line between the properties before she was a child. Tr. at. pp. 22-29. Farrell Bobby Simmons, the son of Sarah Simmons, testified that the fence line had been the boundary. Tr. at pp. 31-34. Appellant testified that there was a marker with the fence line and that he had been told by his father as a child that it was the boundary of the property. Tr. at. P. 55.

Appellant presented sufficient evidence and testimony to establish the property line by "boundary by acquiescence." Appellant also established the necessary elements needed for a "boundary by acquiescence." First, the property line was visually marked. A fence ran right down the line for many years. There is no dispute that a fence existed in the middle of the two properties and it was visible to everyone. Several different people gave testimony at trial that it was their knowledge that the fence was the boundary of the property and that they were not aware of any other boundary line.

Second, there had been mutual acquiescence to the fence being the property boundary line years before Appellee owned the property. In the case of Johnson v. Sessions, 25 Utah 2d 133, 477 P.2d 788, (Utah 1970) "the trial court found a boundary by acquiescence in that a fence was erected by the then owners of the lots some 21 years prior to the commencement of this litigation." The Court of Appeals affirmed the trial court's decision. Based upon this holding, Appellee's acquired ownership of the property does not extinguish the fence as the property line. The fence as the property boundary line had been established for years before the Appellee even received the property. There had been mutual acquiescence to the fence being the property boundary line for years before this litigation. Appellant testified that he had owned one piece of property adjoining the Appellee's land for fifteen (15) years and another piece for six (6) years after purchasing it back from his brother. Tr. at p. 54. Mrs. Simmons testified that Appellee had owned his property for approximately 14 years. Tr. at p. 31. As the fence

had been in place for some time prior to either the Appellant's or Appellee's ownership of the adjacent lands, the property line had been established by mutual acquiescence prior to the ownership of either party in this matter.

Third, as was testified to by Mrs. Simmons, the fence had been in place since before her birth and at the time of trial she was 82 years old. This establishes that the fence had been the boundary line for quite some time and through several different landowners. It is apparent that the fence had been around for a substantial length of time and had been considered the boundary of the property for many years. This establishment meets the third element.

Finally, the adjoining owners of the property never disputed what the property line was. The landowners had established the fence as the boundary line, which was not undone simply because Appellee acquired the property. It was an establish fact at the time the Appellee acquired the property. Mrs. Simmons testified that her son had sold the property to Appellee and that it was her understanding that the fence was the boundary line. Tr. at p. 29. Therefore, it appears that none of the owners with property adjoining Appellee's had any kind of discrepancy with the boundary line of the property being the fence line. Therefore, Appellant established the fourth element.

If the trial court had allowed an amendment to conform to the evidence in this matter, it is clear that Appellant would have succeeded in his claim of "boundary by acquiescence." Even in light of the denial of the motion to amend, Appellant solicited

sufficient evidence at trial to allow this Court to make the determination as to the facts of this matter. Appellant has been substantially prejudiced by the trial court's denial of his motion to amend the *Complaint.*

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that this Court reverse the trial court's order and remand with direction to the trial court to allow Appellant to amend his *Complaint* so as to have a proper trial on the claims contained therein.

DATED this _____ day of April, 2006.

_____
Cindy Barton-Coombs
Attorney for Hal McKee

CERTIFICATE OF MAILING

I hereby certify that on this _____day of April, 2006, I mailed, first class postage prepaid, true and correct copies of the foregoing Reply Brief to:

Daniel S. Sam
Attorney for Defendant/Appellee
319 West 100 South, Suite A
Vernal, Utah 84078

_____

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DATED this 13th day of April, 2006.

Cindy Barton-Coombs
Attorney for Hal McKee

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